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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 752

G. H. MARTIN, *Petitioner*

v.

LAURA S. STRAITZ, Guardian of Beverly Ann Straitz, a Minor, and Frances Straitz, as Ancillary Administratrix of the Estate of William Straitz, Deceased, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Florida in its Civil Action No. 32413.

OPINIONS BELOW

The *per curiam* opinion of the District Court of Appeal of Florida, Second District, in Civil Action No. 3346 (Appendix A, pp. 5a-7a) is reported at 135

So. 2d 239. The orders of the Supreme Court of Florida in Case No. 32413 are reported at 156 So. 2d 861 and are set forth in Appendix A, pp. 18a and 21a.

JURISDICTION

The order of the Supreme Court of Florida denying, without opinion, Petitioner's Petition for Writ of Certiorari was entered July 29, 1963 (Appendix A, p. 18a) and the order denying his Petition for Rehearing was entered October 15, 1963 (Appendix A, p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The issue of Petitioner's rights and immunities under the Fourteenth Amendment to the Constitution of the United States was raised in his Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District (Appendix A, p. 8a), and his Petition for Rehearing filed in the Supreme Court of Florida on August 9, 1963 (Appendix A, p. 18a).

QUESTIONS PRESENTED

1. Whether the refusal of the Supreme Court of Florida to review the judgment of the County Judge's Court in and for Broward County (Appendix A, pp. 1a and 3a), affirmed in the District Court of Appeal of Florida, Second District (Appendix A, pp. 5a-7a), was a denial of Petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States in that the judgment of the County Judge's Court was *dehors* the record and, indeed, based upon an erroneous factual predicate.

2. Whether the judicial review afforded Petitioner in the Supreme Court of Florida and in the District Court of Appeal of Florida, Second District, in this

case under the system of certiorari jurisdiction in effect in the Supreme Court of Florida was a denial of Petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the Fourteenth Amendment to the Constitution of the United States and the pertinent provisions of the Constitution of the State of Florida which are applicable in the instant case are set forth in Appendix B, p. 22a.

STATEMENT

This case arises out of an order of the Supreme Court of Florida which refused to grant a request for review of the decision of the District Court of Appeal of Florida, Second District, which, in turn, upheld a decision of the County Judge's Court of Broward County, Florida, said original decision being based upon matters outside the record before the County Judge.

The rights of the parties involved in this case were originally considered in *In re Estate of William Straitz*, 135 So. 2d 239 (1961), in which the District Court of Appeal of Florida, Second District, reviewed the extended and incredible litigation in this case, reversed the County Judge's Court and ordered that Court to determine the amount of reasonable attorney's fees admittedly due Petitioner herein, and to have those fees paid out of the Estate of William Straitz, deceased, from funds in that Estate. On remand, the County Judge's Court, without the taking

of further testimony, entered final judgment for the sum of $10,000.00 as attorney's fees for Petitioner. This amount is approximately one-half of the amount ($19,916.35) which was shown by undisputed expert proof to be due Petitioner and which was below that which the Court had power and discretion to enter. See *Dade County* v. *Renedo, et al*, 147 So. 2d 313 (1962) at page 316 where the Supreme Court of Florida said:

> "Where expert witnesses are produced and testify as to the value and such testimony is not, in itself, or in relation to other evidence, properly susceptible of different interpretation as in this case, then the jury verdict must be not less than the lowest estimates nor more than the highest."

The County Judge's Court based its award not on a consideration of this expert proof, or on any other matters before the Court, but upon its understanding of evidence in another proceeding before another judge of the Court involving fees to the attorney for the Estate, a proceeding of which Petitioner had no notice and in which he had no opportunity to participate. This information, in addition to being from a collateral proceeding, was factually incorrect.

The judgment of the County Judge's Court was then appealed by Petitioner to the District Court of Appeal of Florida, Second District. During the appeal and prior to a decision by that Court, the Appellee (Respondent here) in its brief admitted that the County Judge's Court had:

> ". . . based its final judgment for Appellant's attorney's fees on either an assumption of fact, or an inference from records in proceedings between Appellees [the Ancillary Administratrix and the Minor] to which the Appellant [Attorney-

> Petitioner] was not a party and of which he had no notice or opportunity to be heard, and in total disregard of the undisputed testimony in this case."

Counsel for the Appellees concluded that:

> "The Acting County Judge should be reversed and this cause remanded."

Upon this confession of error and consent to reversal, we believe that the District Court of Appeal of Florida to afford due process to Petitioner had no choice except to reverse the judgment of the County Judge's Court which it could have done without expressing any opinion as to the extent of the error or errors (See *Indian Harbor Estates, Inc.* v. *Wagner, et al*, 148 So. 2d 757 (1963).) or by entering judgment for the correct amount, since testimony had been given by both litigants almost three years earlier, *King* v. *L. & L. Investors, Inc.*, 136 So. 2d 671 (1962); *Sullivan* v. *Chase Federal Savings and Loan Association*, 132 So. 2d 343 (1961) or conceivably by sending the case back to the County Judge's Court for a new trial or further hearing. It did neither. Instead, the District Court of Appeal of Florida filed a *per curiam* opinion, recorded in 147 So. 2d 172, affirming the lower Court's judgment. In doing so, the District Court of Appeal of Florida ignored the Petitioner's contention that the County Judge's Court improperly considered matters outside the record (Appendix A, p. 4a) and concluded that (Appendix A, pp. 5a and 6a):

> "This appeal involved the amount of an attorney's fees . . . ."
>
> "We find . . . that the lower court had sufficient evidence from which he could determine that $10,000 would be a reasonable fee . . . ."

Each of these statements is erroneous. The appeal instead involved *the power* of the County Judge's Court to go outside the record of the case to determine the amount of Petitioner's fee (See Appendix A, p. 4a), for the County Judge's Court obviously had no competent evidence upon which to base its determination that $10,000.00 was the proper fee due Petitioner. More importantly, the Court based that determination, at least in part, on speculation and assumptions of fact following a private examination of outside records which were not in evidence, records as to which Petitioner was not a party in any way whatsoever.

The record shows that the County Judge's Court did not question the value of Petitioner's services but based its judgment on the assumption that since attorney's fees incurred by an Ancillary Administratrix had been paid, the amount that should be paid to Petitioner should be reduced to $10,000.00. The Court appears to have accepted the value of Petitioner's services as testified to by the Attorneys who appeared as experts, but simply reduced the minimum figure by about one-half because of considerations outside the record.

On review, the District Court of Appeal of Florida stated (Appendix A, p. 6a):

> "It is not in our province to view this record to decide whether or not . . . we would have given more or less amounts to appellant [Petitioner] for his services."

We believe, however, that due process of the law, requires more than Petitioner received and that, as stated in *King* v. *State*, 143 So. 2d 458 (1962):

> "'Due process of law' contemplates that upon appeal the Appellant be accorded a review of his case on its merits."

The inexplainable sidestepping of the issue by the District Court of Appeal of Florida in its *per curiam* opinion, was respectfully called to its attention by Petitioner in a Petition for Rehearing which was denied without opinion (Appendix A, p. 7a). At that time, it was one of some two hundred petitions filed with that Court during that calendar year, all of which were denied without opinion. *28 Academy of Florida Trial Lawyers Journal, Oct. 1963, p. 7.* When "palpably wrong decisions are virtually immunized from effective review" (*American Bar Association Journal, Dec. 1963, p. 1170*), particularly when they may violate Constitutional rights (*King v. State, supra*), we submit that the evil is of significant public concern.

Thereafter, Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of Florida (Appendix A, pp. 8a-17a). No responsive pleadings were filed by any other party to the proceeding. Nevertheless, the request for Writ was denied without opinion, or oral argument (Appendix A, p. 18a). A Petition for Rehearing was then filed (Appendix A, pp. 18a-21a) and was likewise denied without opinion or oral argument (Appendix A, p. 21a).[1]

REASONS FOR GRANTING THE WRIT

The history of this case presents a shocking example of the denial to Petitioner of a Constitutional right, the right to a full and fair trial under the due process clause of the Constitution. Every litigant coming before a court of law in this country is entitled to at

[1] Motion for Written Opinion was also submitted but was returned by the Clerk of the Supreme Court of Florida for the stated reason that the Florida Supreme Court rules contained no provision for the filing of such a Motion.

least a fair hearing in his case and to a judicial decision based upon a record made in open court. We submit that this right has been denied to Petitioner here. Instead, the decision rendered against Petitioner was contrary to the evidence before the trial court and was obviously and admittedly based upon considerations within the trial judge's knowledge in Petitioner's case. More importantly, the decision was based upon a factually erroneous predicate.

The Petitioner's rights to a fair hearing were not vindicated at the appellate levels of review. The opinion of the intermediate appellate court, the District Court of Appeal of Florida, Second District, contained misstatements and misunderstandings of the facts and issues involved. Such errors could not exist were it not for the manner in which the Supreme Court of Florida has treated the certiorari jurisdiction granted to it to review the decision of the District Court of Appeal of Florida which in this case, we submit, has had the effect of virtually precluding effective appellate review of the trial court's decision. The Supreme Court of Florida, pursuant to its certiorari jurisdiction, has made it clear that it will review lower court decisions not in the interest of private litigants, but only to assure uniformity in decisions throughout the state (See *Lake* v. *Lake*, 103 So. 2d 639, 1958). In effect, the Supreme Court of Florida has developed the policy that it will not review a decision of the District Court of Appeal of Florida unless the District Court of Appeal reverses the trial court, or unless there has been at least one dissenting vote to affirmance of the trial court. This policy, in effect, immunizes the action of the District Court of Appeal of Florida from appellate review however erroneous that action

may be. This is the error in this case which we respectfully petition this Court to redress.

This is no mere dispute regarding attorney's fees. This case instead exemplifies the danger inherent in the practices of the Supreme Court of Florida, a danger which was recognized by Justice Hobson of that Court in his specially concurring opinion in *King* v. *State*, *supra*, when he noted at page 467 that:

> "This case points up the danger of the adoption of an 'ironclad' rule to the effect that the Supreme Court of Florida will not consider a petition for certiorari directed to a district court of appeal when such court's opinion consists merely of the words 'Per Curiam Affirmed' or [similar] language . . ."
>
> "If such an inexorable rule were in existence this court would be powerless to protect the constitutional right of the Petitioner or any person to due process of law."

We respectfully submit that Petitioner here has been deprived of a Constitutional right and that a principle of jurisprudence is at stake which is of vital importance to preserving the rights of individuals to a fair trial and to due process of law.

CONCLUSION

For the above reasons, we respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EARL R STANLEY
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600 Munsey Building
Washington 4, D. C.
Attorney for Petitioner

APPENDIX A

IN THE COUNTY JUDGE'S COURT IN AND FOR BROWARD COUNTY, FLORIDA

No. 10,356

State of Florida
County of Broward
Filed and Recorded
this 12 day of April 1962
in Probate Record
Book 137 page 527
Boyd H. Anderson, County Judge
By Vivian Shields, Clerk

IN RE: ESTATE OF WILLIAM STRAITZ, DECEASED

Final Judgment

THIS CAUSE came on for hearing on the order and mandate of the District Court of Appeal of Florida, Second District, and Motion of Petitioner herein, after due notice to the Respondents.

The Court finds that a reasonable fee for the services of Petitioner rendered to Beverly Ann Straitz, a minor, and her estate in the above estate is $10,000.00, and that Petitioner is not entitled to interest thereon from the date of his discharge on or about February 7, 1957, but is entitled to his costs expended herein.

It is, therefore, ORDERED ADJUDGED AND DECREED that Petitioner, G. H. Martin, do have and recover of and from Beverly Ann Straitz, a minor, the sum of $10,000.00, together with his court costs expended herein, in the sum of $197.05.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner herein do have a lien for said amount on the interest of Beverly Ann Straitz, a minor, in the estate of William Straitz, deceased.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Frances Straitz, as Ancillary Administratrix of the Estate of William Straitz, deceased, pay such sums from funds due Beverly Ann Straitz from the William Straitz estate to said G. H. Martin.

Seal County Judge's Court . .

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 9th day of April, 1962.

/s/ RICHARD M. SAULS
Circuit Judge acting as
County Judge

IN THE COUNTY JUDGE'S COURT IN AND FOR BROWARD COUNTY

State of Florida
County of Broward
Filed and Recorded
this 29 day of May 1962
in Probate Record
Book 143 Page 140-141
BOYD H. ANDERSON, County Judge
By VIVIAN SHIELDS, Clerk

Order

THIS CAUSE coming on to be heard on the petition of G. H. Martin for rehearing, and the Court having heard argument of counsel, and, further, having considered the petition for rehearing, is of the opinion that the final judgment entered in this cause on the 9th day of April, 1962, should be affirmed, except for the question of interest.

The Court is of the opinion that interest should be allowed, and that the same was omitted from the final judgment through error by the Court.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the final judgment of this Court, dated the 9th day of April, 1962, be, and the same is hereby amended to include interest on the

sum of TEN THOUSAND DOLLARS, the reasonable attorney's fees found by the Court to be due G. H. Martin for services performed as therein mentioned, from the date of his discharge, to-wit: February 7, 1957, at the rate of SIX PERCENT (6%) per annum.

It is further, ORDERED, ADJUDGED and DECREED that the petitioner's motion for rehearing be, and the same is hereby denied, and that the judgment of this Court dated the 9th day of April, 1962, is hereby ratified and affirmed, except as hereby modified, and, further, that this order is effective nunc pro tunc as of the 9th day of April, 1962. See: *Huntley* v. *Baya*, 136 So2d 248.

DONE and ORDERED this 28th day of May, 1962.

/s/ RICHARD M. SAULS
Richard M. Sauls,
Circuit Judge

IN THE COUNTY JUDGE'S COURT IN AND FOR BROWARD COUNTY

In Re: Estate of William Straitz Deceased

Notice of Appeal

The Petitioner, G. H. MARTIN, by and through his undersigned attorney, takes and enters this, his appeal, to the District Court of Appeal of Florida, Second District, from the Final Judgment of the County Judge's Court in and for Broward County, Florida, bearing date the 9th of April, 1962, and entered in the above-styled cause and recorded in Probate Record Book 137, page 727, on the 12th day of April, 1962, and the Order modifying the same, nunc pro tunc, dated the 28th day of May, 1962, and recorded on May 29, 1962, in Probate Record Book 143,

page 140-141; and all parties to said cause are called upon to take notice of the entry of this appeal.

/s/ J. B. PATTERSON
Attorney for Petitioner.
111 SE 6th Street 522-6716
Fort Lauderdale, Florida

State of Florida
County of Broward
Filed and Recorded
this 6 day of June, 1962
in Probate Record
Book 143 Page 704
BOYD H. ANDERSON, County Judge
By VIVIAN SHIELDS, Clerk

IN THE COUNTY JUDGE'S COURT IN AND FOR BROWARD COUNTY

Filed
June 1 1962
BOYD H. ANDERSON
County Judge

Assignments of Error

Now comes G. H. MARTIN, Petitioner, by and through his undersigned attorney, and assigns the following errors to be asserted and relied upon by him on his appeal entered herein on June 6, 1962:

1. The Court erred in entering the Final Judgment dated April 9, 1962, and recorded in Probate Record Book 137, Page 727, and its order modifying same dated May 28, 1962, and recorded in Probate Record Book 143, page 140-141.

2. The Court erred in basing its said Final Judgment and order modifying same on records outside the proceedings in this matter, to which neither the Acting Judge nor Petitioner was a party in any capacity, and of which Petitioner had no notice or opportunity to be heard.

3. The Court erred in entering judgment for less than the amount of the reasonable attorney's fees earned and

proved, on the supposition or speculation by the Court that a part of those services had been paid for by the minor or her guardian as a result of proceedings outside the record in this case, as to which proceedings Petitioner had no notice or opportunity to be heard, either individually or as representative of any party litigant.

/s/ J. B. PATTERSON
Attorney for Petitioner
111 SE 6th St. 522-6716
Fort Lauderdale, Florida

On November 7, 1962, Per Curiam Opinion and Order was filed herein in words and figures as follows:

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

JULY TERM, A. D. 1962

Case No. 3346

IN RE: ESTATE OF WILLIAM STRAITZ, Deceased
G. H. MARTIN, *Appellant,*

v.

LAURA S. STRAITZ, as guardian of Beverly Ann Straitz, a minor, *Appellee.*

Opinion filed November 7, 1962

Appeal from the County Judge's Court of Broward County; Richard M. Sauls, Circuit Judge, acting as County Judge.

J. B. Patterson, Fort Lauderdale, for appeliant.

Miller & Tucker, Fort Lauderdale, and Hayward H. Davis, Lake Placid, for appellee.

PER CURIAM

This appeal involves the amount of an attorney's fee which the lower court awarded the attorney for a minor

for representing said minor in connection with the administration of her father's estate.

The lower court awarded said attorney, appellant here, the amount of $10,000 with interest at six percent (6%) from February 7, 1957, the date of his discharge by the guardian of the minor involved. Appellant contends said award is insufficient.

We have closely reviewed the record and find that the lower court had sufficient evidence from which he could determine that $10,000 would be a reasonable fee commensurate to the value of the legal services performed and to the value of said services to the minor's one-half share of the estate in question, said estate having an indicated gross value of approximately $490,000.00.

The lower court could consider whether or not all the services rendered by the appellant were of value to the ward's interest; whether the trips taken out of the State of Florida in the domain of the principal administrator were necessary since this was an ancillary administration; consider the testimony of the professional witnesses as to the value of the appellant's services and then determine the weight he would give to such testimony. It was in the domain of the trial judge to determine these questions.

It is not our province to view this record to decide whether or not, had we been in the place of the nisi prius judge, we would have given more or less amounts to the appellant for his services. Nor, based upon the record before us, can we say that the lower court committed reversible error in not awarding the appellant a fee larger than $10,000.

The lower court, citing Huntley v. Baya, Fla. App. 1962, 136 So. 2d 248, as aforesaid also awarded interest on the attorney's -2- fee from the date said fee became due, to wit: the date of appellant's discharge by the minor's guardian on February 7, 1957. Appellee has cross-assigned as error the award of interest. Based on the

authority relied on by the lower court, it is our view that the lower court acted within its discretion in awarding interest on the attorney's fees.

Perceiving no grounds for reversal, the judgment appealed from is affirmed.

Affirmed.

ALLEN, A. C. J., SMITH and WHITE, JJ., Concur.

(This Decision Is Reported in *147 So.2d 173*)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT

JULY TERM, A. D. 1962

Thursday, December 6, 1962

Case No. 3346

IN RE: THE ESTATE OF WILLIAM STRAITZ, Deceased
G. H. MARTIN, *Appellant*,

v.

LAURA S. STRAITZ, as guardian of Beverly Ann Straitz, a minor, *Appellee*.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

A TRUE COPY
TEST:

/s/ JOSEPH E. GILLEN
Clerk, District Court of Appeal,
Second District

IN THE SUPREME COURT OF FLORIDA

IN RE: ESTATE OF WILLIAM STRAITZ, DECEASED
G. H. MARTIN, *Petitioner*,

v.

LAURA S. STRAITZ, as Guardian of Beverly Ann Straitz, a minor, and FRANCES STRAITZ, as Ancillary Administratrix of the Estate of William Stratiz, deceased, *Respondents*.

Petition for Writ of Certiorari to the District Court of Appeal, Second District

To the Supreme Court of Florida:

Petitioner, G. H. MARTIN, through his undersigned attorney, respectfully presents this, his Petition for Writ of Certiorari, and states:

1. Petitioner, seeks to have reviewed the per curiam order or decision of the District Court of Appeal of Florida, Second District, dated November 7, 1962, and reported in *147 So2d 173*. This Order affirmed the Final Judgment entered by the Acting County Judge of Broward County, Florida, dated April 9, 1962.

2. The only basic question of fact or law raised by this Petition is identical with the "Point Involved" in the District Court of Appeal, Second District, to-wit:

> "1. DID THE ACTING COUNTY JUDGE OF THE PROBATE COURT VIOLATE THE ORDER AND MANDATE OF THIS COURT 'TO DETERMINE A REASONABLE FEE TO BE AWARDED' TO APPELLANT-ATTORNEY, *(135 SO2D 241.)* WHEN IT BASED ITS FINAL JUDGMENT FOR APPELLANT'S ATTORNEY'S FEES ON EITHER AN ASSUMPTION OF FACT OR AN INFERENCE FROM RECORDS IN PROCEEDINGS BETWEEN APPELLEES TO WHICH APPELLANT WAS NOT A PARTY AND OF WHICH HE HAD NO NOTICE OR OPPORTUNITY TO BE HEARD, AND IN TOTAL DISREGARD OF THE UNDISPUTED TESTIMONY IN THIS CASE?"

3. Both litigants agreed on the wording of the above issue. Both litigants agreed that the lower court Judgment should be reversed.

Other questions discussed in the District Court of Appeal are not involved here, such as the form the Order of Reversal should take and the date from which interest shall start. The order or decision of affirmance on review ignored and avoided this basic issue.

4. This Petition is presented under and pursuant to *Article V, § 4, of the Florida Constitution* and *Rule 4.5 c of the Florida Appellate Rules.* It raises foursquare the right of a trial court to base its Final Judgment on anything except the record in the case, under the due process clause of the Constitution, and the duty of the Appellate Court to assert its ascendancy when the matter is brought to its attention.

5. This Petitioner is supported by a certified Transcript of the entire record before the District Court. This shows jurisdiction in the Supreme Court and establishes the facts relied upon by the Petitioner, including the above-described order, which Petitioner seeks to have reversed, and also a supporting Brief.

6. The record of the District Court of Appeal of Florida, Second District, in this case shows that:

a. This proceeding originated in the County Judge's Court of Broward County, Florida, in Probate. Petitioner herein was Petitioner in that Court, and Appellant in the District Court of Appeal of Florida, Second District. Respondent, Frances Stratiz, as Ancillary Administratrix, is a party hereto solely because these proceedings are in the estate she represents. She is not involved otherwise, and has not participated in this case by pleading or brief. The original Guardian, Frank Zimmerman, was replaced by the current one, after the discharge of Petitioner-attorney, for the recovery of whose services this proceeding was brought. *112 So2d 889.*

b. On the first appeal the Acting County Judge was reversed. *135 So2d 239.* This became the law of the case and

settled everything except the amount of Appellant's reasonable Attorney's fees for representing the minor and her interests in this, her father's estate. The testimony had been concluded and was before the District Court of Appeal of Florida, Second District, when its decision was rendered. That decision recited the facts of the case and reversed the order of the Acting County Judge appealed from,

> "with directions to the Probate Court to determine a reasonable fee to be awarded to the Attorney [Appellant below and Petitioner herein]."

c. On remand neither party offered any further testimony, whereupon, on April 9, 1962, said Acting County Judge entered Final Judgment for said attorney in the sum of $10,000.00. This is about one-half of the value as established by the undisputed testimony in the case. To arrive at this reduced amount, the Acting County Judge admittedly went outside the records in this proceeding. The details will be discussed in our Brief, but in the main, it was because of the unadulterated assumption by the Acting County Judge, apparently based, at least in part, on records in the estate proceedings which he had privately inspected, and which presumably showed that:

> "she [the minor] has been required to pay for services at one time, in these same [estate] proceedings . . . Her share of the estate has been charged one time, a portion of somebody's attorney's fees . . . I know they [the District Court of Appeal] said he [Martin] was entitled to a reasonable fee. That's all they say . . . but I still say the minor should not be charged for what the entire estate . . . received [from Martin's services.]"

d. These are the words of the Acting County Judge, made months after the testimony was closed, and after *135 So2d 239* was published. The reference is to other proceedings

in the estate—after Martin's discharge, *none of which was in evidence; and to none of which Martin was a party, or had notice or opportunity to be heard, and which could not have covered his services to the minor,* but at most, only the services of one W. G. Miller, for Miller's services to the Ancillary Administratrix of the estate.

e. On June 6, 1962, Notice of Appeal from said Final Judgment was filed by Appellant-attorney, Petitioner herein. This was docketed as case No. 3346. In an effort to save the Court's time, Appellant later filed Motion for Judgment in the earlier case, No. 1772, asserting that the said Final Judgment did not comply with, but circumvented, the order and mandate of said Appellate Court, as contained in its opinion and Order reported in *135 So2d 239, 241.* In support thereof he filed the *original* Transcript of Proceedings held in the Probate Court on April 9, 1962, and on May 9, 1962, following the entry of the order of reversal, and moved for consolidation of said cases numbered 1772 and 3346.

f. On July 13, 1962, Appellant's said Motion for Judgment was set for hearing and orally argued before the District Court, prior to the time for filing Transcript of Record, or Brief, in the appealed case. At that time the District Court of Appeal of Florida, Second District, was advised that the subject matter of said Motion for Judgment and of said appeal were identical. Thereupon, the Court directed counsel to make whatever argument they wished on both matters, and ordered that no further oral argument would be permitted. The parties were also directed to file their Briefs in due course, in case No. 3346, using the Transcript already filed in No. 1772, and that to be filed in case No. 3346, without unnecessary duplication. This was done.

g. In the Briefs thereafter filed by Appellant and Appellee, the parties to said appeal admitted to the District Court

of Appeal of Florida, Second District, that the Final Judgment on appeal was "based . . . on either

"an assumption of fact *or*

"an inference from records in proceedings between Appellees-Respondents, (the minor and Ancillary Administratrix,) to which Appellant was not a party *and*

"of which Appellant had no notice *or* opportunity to be heard, *and*

"in total disregard of the undisputed testimony in the case."

These are direct quotations from Appellant's Point Involved, Br. p. 5, and Appellee's Point 1, Br. p. 3, which are identical, as alleged above. Appellee's other points are not involved in this Petition. This Petition deals only with the legality of the Judgment for an amount based on extraneous considerations contrary to the record in this proceeding.

h. Accordingly, *both parties to said appeal recommended to the said District Court of Appeal that the Final Judgment should be reversed.* They disagreed as to how.

1. Appellant urged that the District Court of Appeal either

a. enter "judgment on the basis of the undisputed testimony in the case or"

b. instruct the lower court to do so "for the full amount of Appellant's fees, on the basis of the accepted testimony, without deduction for any real or fancied wrong which he thinks may have occurred between Appellees." Br. p. 18.

2. Appellee urged that

"The Acting County Judge should be reversed and this cause be remanded . . . with specific instructions

from this (Appellate) Court as to what fees the Appellant can collect. . . ." Br. p. 20.

i. Thus it will be noted that the point of difference between the positions of Appellant and Appellee was not whether or not the Final Judgment on appeal should be reversed. They agreed that it should be. Their major disagreement was as to *how* it should be reversed. Appellant contended that, since the testimony was concluded and the lower court resented his reversal and was reluctant (and refused) to completely comply with the mandate of the Appellate Court, the Appellate Court should enter the judgment or specifically direct the Acting County Judge to enter judgment for the full amount established by the undisputed testimony in the case. Appellee asked that the order of reversal spell out what services should be paid for.

j. Instead of following one of the alternatives suggested by the litigants, on November 7, 1962, the District Court of Appeal of Florida, Second District, entered its said per curiam order, affirming the lower court's Final Judgment. This order is reported in 147 So2d 173. On the same day the District Court also denied the Appellant's Motion for Judgment, and, inferentially, denied Appellee's request for reversal with instructions, as contained in Appellee's Brief, p. 20. These other orders are all incidental or ancillary to the order on review, 147 So2d 173, which decided the merits of the appeal.

On November 20, 1962, Appellant filed his Petition for Rehearing of both of said orders, which Petition was denied without opinion, on December 6, 1962.

7. On the foregoing facts the District Court of Appeal of Florida, Second District, was presented with the following points of law:

a. That the decision of the District Court of Appeal of Florida, Second District, reported in *135 So2d 239, 241*, is the law of the case.

b. That said decision required the lower court to determine a reasonable fee to be awarded the attorney, "on the record in the case and only on the record in the case."

c. That said decision did not and could not license the lower court to depart from that record and enter a Final Judgment based on thin air; on any supposition, speculation or assumption of the Acting County Judge; on any other record or proceeding not in evidence; and especially, on some proceeding between the two Appellees, (the minor and the Ancillary (Administratrix,) to which Appellant was not a party in any capacity, had no notice of or opportunity to be heard, and which was not even offered in evidence.

d. That said decision further did not and could not license the said trial court, nor was he permitted, to browse around in other court records not in evidence, and on the basis of any privately acquired judicial knowledge, enter judgment "in total disregard of the undisputed testimony in this case."

e. That the Final Judgment on appeal, entered on either "an assumption of fact," or on "an inference from records in proceedings to which Appellant was not a party, had no notice or opportunity to be heard and in total disregard of the undisputed testimony of the case," not only

1. overruled and circumvented the said Order and mandate of the District Court of Appeal of Florida, Second District, but it

2. flagrantly violated Appellant's constitutional rights under Sections 4 and 12 of the Declaration of Rights of the Florida Constitution, and Articles V and XIV, § 1, of the Amendments to the United States Constitution. And it also

3. is contrary to the decisions of both the Supreme Court of Florida and the District Courts of Appeal of Florida, including those of the Second District.

f. That in this situation the said District Court of Appeal of Florida, Second District, had no choice except to reverse the Final Judgment on appeal. In this order of reversal it was also urged that the District Court of Appeal could and should, not only recognize the sanctity of the due process clauses of said Constitutions, but, under the circumstances, it should assert its ascendancy over the trial court and its own dignity and authority by either entering the judgment which its order in *135 So2d 239* required, or order the lower court to do so, specifying the amount of the judgment. Appellee urged, as a third alternative, that the order of reversal should spell out the items of services which the lower court should consider in reaching the amount of the Final Judgment.

g. That in sidestepping and ignoring the constitutional issue agreed on by the litigants, the District Court of Appeal based its decision on the same type of speculation of which the lower court was guilty: i. e., what the lower court "could" have considered, but which the record shows he either did not or could not have legally considered.

On these points of law the per curiam order of the District Court of Appeal of Florida, Second District, on review, had the effect of denying and overruling these points of law.

8. The same points of law were involved in the following cases:

A. On Violating Appellant's Constitutional Rights—

Florida Constitution, Declaration of Rights, §§ 4, 12

United States Constitution, Amendments V and XIV, § 1

Peters v. Hobby, 349 US 331, 75 S Ct 790

Thorn v. Florida Real Estate Commission, Fla App, 146 So2d 907, Nov. 13, 1962

*Mathews v. Mathews, Fla App, 133 So2d 91

*Keathley v. Elb, Fla App, 133 So2d 471

*Walden v. Walden, Fla App, 114 So2d 815

*Castner v. Ziemer, Fla. App. 113 So2d 263

*Reher v. Weeks, Fla App, 106 So2d 865

In re Nuckols' Estate, Fla App, 147 So2d 340, Dec. 18, 1962.

Shoultz v. State, Fla, 106 So2d 424

Mobley v. State, Fla, 143 So2d 821

Tomayko v. Thoms, 143 So2d 227

Lasseter v. Blalock, Fla App. 139 So2d 726

Hodges v. State Road Department, Fla, 112 So2d 593

Wright v. Roller, Fla, 111 So2d 485

Cassell v. Ideal Farms Drainage District, Fla, 23 So2d 247

Western Union Telegraph Co. v. Suit, 153 Fla 490, 15 So2d 33

Ryan's Furniture Exchange v. McNair, 120 Fla 109, 162 So 483

Fiehe v. R. E. Householder Co., 98 Fla 627, 125 So 2

A. C. L. R. Co. v. Hendry, 112 Fla 391, 150 So 598

Bestal v. Bestal, 53 P2d 525

Commonwealth ex rel Mark v. Mark, 115 Pa Sup, 181, 175 A 289

Tsaraclis v. Characklis, Md. 3 A2d 725

B. On the Duty of the Appellate Court When the Trial Court Tries to Circumvent the Mandate:

Dade County v. Renedo, Fla, 147 So2d 313, Dec. 5, 1962

Shields v. Bowlick, Fla App, 146 So2d 903, Dec. 18, 1962

King v. L. & L. Investors, Inc., Fla App, 136 So2d 671

Sullivan v. Federal Savings and Loan Ass'n, Fla App, 132 So2d 341, 343.

The percuriam order on review is in direct conflict with the above-mentioned constitutional provisions and decisions, particularly those marked with "*", decided by the same District Court of Appeal.

9. Because of the reasons and authorities set forth in Petitioner's Brief, it is believed that the decision above sought to be reversed is erroneous and that the decisions of the Supreme Court and District Court of Appeal, above-cited, are correct and should be approved by this Court as the controlling law for the State of Florida.

Wherefore, Petitioner requests this Court to grant a Writ of Certiorari and enter its order quashing the decision and order above sought to be reviewed, (147 So2d 173,) approving the decisions of this Court and the District Court of Appeal, above-cited, as the correct decisions in said matters, and granting such other and further relief as shall seem right and proper to this Court.

Respectfully submitted,

/s/ J. B. Patterson
Attorney for Petitioner-Appellant
200 SE 6th Street
Fort Lauderdale, Florida

IN THE SUPREME COURT OF FLORIDA

Monday, July 29, 1963

(Caption Omitted)

Case No. 32,413

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Second District, in said cause bearing date November 7, 1962, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

IN THE SUPREME COURT OF FLORIDA

(Caption Omitted)

Petition for Rehearing

By its per curiam order without opinion dated July 29, 1963, this honorable Court has sidestepped or ignored its constitutional duties and tacitly approved the flagrant violation of Petitioner's constitutional rights under the due process clauses of the United States and the Florida Constitutions, by both the lower court and the District Court Court of Appeal, Second District, whose decisions this Court supervises, as follows:

1. The Probate or Trial Court:

The said lower court based the amount of its judgment (on appeal)

> "on either an assumption of fact or an inference from records in proceedings between Appellees, to which Appellant was not a party and of which he had no notice or opportunity to be heard, and in total disregard of the undisputed testimony in this case."

These quoted words are from the issue on appeal, as worded by both Appellant and Appellee, R. 116 (Appel-

lant); R. 118 (Appellee); A-1. That issue is based on the record in that court, R. 3-5, 8, 9; A. 2-8.

2. The District Court of Appeal, Second District:

The said appellate court, (except for the last paragraph of his opinion relative to interest, which is not involved herein,) by its per curiam order, on review, *147 So2d 172*, disregarded that record and evaded the sole basic issue on appeal, by writing a five-paragraph opinion that has no application whatsoever to that issue; and refused to revise its slanted or inaccurate recital of facts and inapplicable statement of law on Petition for Rehearing.

The procedure followed in the trial court and silently approved by said appellate court is condemned by the decisions of both the Supreme Court of Florida and the same District Court of Appeal of Florida, by an unbroken line of decisions quoted and cited at length in our brief in this Court. Those cases were, in effect, overruled by the decision on review, although not even mentioned. Recent cases upholding the same principles contended for by Petitioner, and reported since the filing of our brief, are:

Dade Co. v. *Renado, Fla, 147 So2d 313, 315, 316*, Dec. 5, 1962, opinion by Justice O'Connell;

In res Nuckol's Estate, Fla App, 147 So2d 340, 341, 342; Dec. 18, 1962;

Bernardo & Sons v. *Duncan, Fla App, 147 So2d 542;* December 4, 1962;

Watts v. *Mayfield, 20 Fla Supp 93.*

3. The Supreme Court of Florida:

This Court has demonstrated by its orders herein that it did not read the record, including the brief of Petitioner, filed herein, and was not aware of their contents, when this Court

(a) Granted to Respondent ex parte on April 11, 1963, her motion to discontinue progress in this cause until fifteen days subsequent to the adjournment of the Florida Legislature, which convened for sixty days, beginning April 2, 1963, of which body the attorney for Respondent was a member, for that reason alone, when the records of this Court show that said Respondent was over a month in default *before* the Legislature convented, without excuse, in filing her brief in the Supreme Court;

(b) Recited in its said per curiam order without opinion, dated July 29, 1963, that it considered this case "upon the basis of the transcript of record and *briefs*;" when the *only brief* before this Court was Petitioner's brief filed with this Court on or about February 9, 1963;

Respondent filed no brief, and could not file an honest one without

(1) *again* admitting that the judgment on appeal is made out of thin air and (2) that the per curiam order on review does not faithfully or accurately recite the facts or law involved in the appeal;

(c) Indicated in said per curiam order of July 29, 1963, that it had only "inspected" the record in this case. That is not sufficient to apprise this, or any, court of what is involved. Nothing less than reading the record and brief or hearing oral argument based thereon can possibly acquaint this honorable Court with the facts or applicable law. Even reading *147 So2d 172*, R. 160-161, will not do it; for that opinion omits all reference to the pertinent facts of the case; and it ignores the only basic issue before it, to-wit: the legality of a judgment in any amount that is not based on the record before the Court, but on the trial court's assumption of facts or inference from foreign or extraneous records.

To properly supervise the decision of the District Court of Appeal and intelligently and "soberly consider" the

merits of this petition for Writ of Certiorari, knowledge of something besides the usual presumed correctness of trial courts and the average infallibility of District appellate courts, both of which are absent in this case, is indispensible.

Petitioner, therefore, respectfully petitions this honorable Court for a hearing or rehearing, as the case may be, on his Petition for Writ of Certiorari.

/s/ J. B. Patterson
Attorney for Petitioner
200 SE 6th Street—523-7393
Fort Lauderdale, Florida

IN THE SUPREME COURT OF FLORIDA

Tuesday, October 15, A. D. 1963

(Caption Omitted)

Case No. 32,413

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

It Is Ordered by the Court that the said petition be, and the same is hereby, denied.

A True Copy,

Test:

Guyte P. McCord
Clerk Supreme Court

APPENDIX B

The Provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States are as Follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Pertinent Provisions of the Constitution of the State of Florida as found in FLORIDA STATUTES ANNOTATED, Vol. 26, pp. 145 and 291, are as follows:

Article V, Section 4(2)

> ". . . The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, ..."

Article V, Section 5(3)

> "Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court."